BANK BUMIPUTRA MALAYSIA BHD. KUALA TRENGGANU

v.

MAE PERKAYUAN SDN. BHD. & ANOR.

SUPREME COURT, KUALA LUMPUR
TUN DATO' SERI ABDUL HAMID BIN HJ. OMAR LP, DATO' EDGAR JOSEPH JR. SCJ, DATO' MOHD. EUSOFF BIN CHIN SCJ
[CIVIL APPEAL NO. 02-219-91]
7 APRIL 1993

CONTRACT: Bridging loan agreement - Recall of facility - Claim for recovery of amount owing - Counterclaim for damages for breach of agreement - Trial Court dismissing claim and allowing counterclaim - Appeal against dismissal of claim and quantum of damages awarded - Whether damages sufficiently proved - Whether damages too remote.

The first respondent was desirous of developing certain lands in Dungun into a housing estate (the Dungun project) and also of purchasing land in Tampin for the purpose of development into a housing estate (the Alor Gajah project). The first respondent approached the appellants who after having studied details of the proposals, granted bridging finance operated under an overdraft facility to the first respondent.

On the respondents' failure to service the interest, the appellants withdrew the facility and claimed for the amount outstanding inclusive of interest and costs. It was a term of the agreement that interest on all sums disbursed by the appellants was to be capitalised. The respondents counterclaimed for damages for breach of the bridging loan agreement. The trial Judge found in favour of the respondents and dismissed the claim and allowed the counterclaim. The appellants appealed.

Held:

[1] There had been negotiations between the appellants and the first respondent before the appellants agreed to give the bridging finance and the appellants were fully aware that the first respondent would receive no income from the project until the sale and purchase agreements for the project were signed.

[2] The appellants were not entitled to issue the recall letter purely on the ground that interest had not been serviced by the first respondent because the first respondent was not obliged under the agreement to pay interest during the bridging period.

[3] The typescript words in the agreement provided for a term loan whereas the printed words provided that the loan was repayable on demand. By applying the *contra proferentes* rule, the printed words must be rejected in favour of the typescript words.

[4] The appellants were in breach of contract when it treated the term loan as an on demand loan and recalled it prematurely before its right to do so had accrued and the respondents were entitled to damages.

[5] The loss of profits on the Dungun project which the first respondent would suffer was the natural and probable result of the breach of the agreement by the appellants and when the appellants agreed to provide the bridging finance to the first respondent, the appellants well knew of the loss that the first respondent would incur should the appellants break the contract.

[6] The loss of profits claimed in respect of the Alor Gajah project was dependent upon the application of profits from the Dungun project and as such the claim was too remote. The other heads of damages claimed by the respondents were not properly substantiated and should be disallowed.

[7] The dismissal of the appellants' claim in respect of the sum owing by the first respondent to the appellants on the overdraft facility on the ground that the appellants were in breach of contract in recalling the overdraft prematurely could not be justified. There was no ground in law for exempting the first respondent from liability to repay the loan.

[8] The appellants' claim for interest on the loan at the rate agreed in the agreement, for the period after the overdraft was prematurely recalled, must be disallowed on the ground that in so recalling the facility the appellants were in breach of contract.

[Appeal allowed in part. Each party to bear own costs].

[**Bahasa Malaysia** Translation of Headnote]

KONTRAK: Perjanjian "bridging loan" - Penarikan balik kemudahan - Tuntutan bagi mendapatkan semula jumlah yang terhutang - Tuntutan balas bagi ganti rugi untuk kemungkiran perjanjian - Mahkamah perbicaraan menolak tuntutan dan membenarkan tuntutan balas - Rayuan terhadap penolakan tuntutan dan kuantum gantirugi yang diawadkan - Sama ada ganti rugi dibuktikan dengan secukupnya - Sama ada ganti rugi diluar dugaan.

Responden pertama berhasrat untuk memajukan beberapa tanah di Dungun kepada sebuah taman perumahan (Projek Dungun) dan juga untuk membeli tanah di Tampin bagi tujuan memajukannya kepada sebuah taman perumahan (Projek Alor Gajah). Responden pertama telah menemui perayu dan setelah mengkaji butir-butir mengenai cadangan-cadangan tersebut, perayu telah memberikan "bridging finance" yang dikendalikan di bawah suatu kemudahan overdraf kepada responden pertama.

Atas kegagalan responden-responden untuk membayar faedahnya, perayu telah menarik balik kemudahan tersebut dan menuntut jumlah wang yang masih tertunggak termasuklah faedah dan kos. Adalah menjadi satu terma perjanjian tersebut bahawa faedah ke atas segala jumlah wang yang diberi keluar oleh perayu hendaklah dipermodalkan. Responden-responden menuntut balas untuk gantirugi di atas kemungkiran perjanjian "bridging loan". Hakim perbicaraan memberi keputusan memihak kepada responden-responden dan telah menolak tuntutan tersebut serta membenarkan tuntutan balas. Perayu telah merayu.

Diputuskan:

[1] Terdapat rundingan di antara perayu dan responden pertama sebelum perayu bersetuju untuk memberikan "bridging finance" dan perayu sedar bahawa responden pertama tidak akan memperolehi sebarang pendapatan daripada projek berkenaan sehinggalah perjanjian jual-beli bagi projek tersebut ditandatangani.

[2] Perayu tidak berhak untuk mengeluarkan surat penarikan balik tersebut semata-mata atas alasan bahawa faedah tidak dibayar oleh responden pertama kerana responden pertama tidak diwajibkan di bawah perjanjian tersebut untuk membayar faedah sepanjang tempoh "bridging" tersebut.

[3] Kata-kata naskah bertaip dalam perjanjian tersebut memperuntukkan suatu pinjaman berjangka sementara kata-kata yang bercetak memperuntukkan bahawa pinjaman tersebut perlu dibayar balik atas tuntutan. Dengan menggunakan kaedah *contra proferentes*, kata-kata yang bercetak mestilah ditolak dan kata-kata naskah bertaip hendaklah digunakan.

[4] Perayu telah memungkiri kontrak apabila ia menyifatkan pinjaman berjangka sebagai suatu pinjaman atas tuntutan dan menariknya balik sebelum genap tempohnya iaitu sebelum haknya untuk berbuat sedemikian terakru dan responden-responden adalah berhak mendapat gantirugi.

[5] Kehilangan keuntungan ke atas Projek Dungun yang mana akan ditanggung oleh responden pertama adalah akibat semulajadi dan berkemungkinan daripada kemungkiran perjanjian tersebut oleh perayu dan apabila perayu bersetuju untuk membekalkan "bridging finance" kepada responden pertama, perayu sedar bahawa responden pertama akan menanggung kerugian sekiranya perayu memungkiri kontrak tersebut.

[6] Kehilangan keuntungan yang dituntut berhubung dengan Projek Alor Gajah bergantung ke atas pemakaian keuntungan daripada Projek Dungun dan oleh yang demikian tuntutan tersebut adalah terlalu di luar dugaan. Bahagian-bahagian kerugian lain yang dituntut oleh responden tidak dibuktikan dengan sewajarnya dan tidak harus dibenarkan.

[7] Penolakan tuntutan perayu berhubung dengan jumlah wang yang terhutang oleh responden pertama di atas kemudahan overdraf atas alasan bahawa perayu memungkiri kontrak dalam menarik balik overdraf tersebut sebelum genap tempohnya tidak dapat dijustifikasikan. Tiada alasan di bawah undang-undang bagi mengecualikan responden pertama daripada bertanggung-jawab untuk membayar balik pinjaman tersebut.

[8] Tuntutan perayu bagi faedah ke atas pinjaman pada kadar dipersetujui dalam

perjanjian bagi tempoh selepas overdraf ditarik balik sebelum genap tempohnya, tidak harus dibenarkan atas alasan bahawa dalam menarik balik kemudahan tersebut perayu telah memungkiri kontrak.

[Rayuan dibenarkan secara sebahagian. Setiap pihak menanggung kos sendiri].

Cases referred to:
Eushun Properties Sdn. Bhd. v. MBf Finance Bhd. [1992] 3 CLJ 1519/ [1992] 2 MLJ 137 ***(foll)***
Titford Property Co. Ltd. v. Cannon Street Acceptance Ltd. [1975] unreported ***(foll)***
General Securities Ltd. v. Don Ingram Ltd. [1940] SCR (Canada) at 670 ***(refd)***
Hadley v. Baxendale [1854] 9 Ex, 34 ***(refd)***
Rook v. Barnand [1964] AC 1129 ***(refd)***
Cassell v. Broome [1972] 1 All ER 801 ***(refd)***
Broadloom Cpn (1968) Ltd. v. Bank of Montreal et al [1979] 25 OR (2d), 198 ***(refd)***
Emar Sdn. Bhd. v. Aidigi Sdn. Bhd. [1992] 2 MLJ 734 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 11
Contracts Act 1950, s. 74(1) & (2)
National Land Code 1965
Rules of the High Court 1980, O. 42 r. 12

Other sources referred to:
Chitty on Contracts, Vol. 1, 24th Edn., para 716, p. 330
Halsbury's Laws of England, 4th Edn., Vol. 12, p. 465, paragraph 1179
Litigation Support and Financial Assessment of Damages, D.R. Chilver & C.J. Lemar, p. 57
Paget's Law of Banking, 10th Edn., p. 183

For the appellants - T. Thomas (Shamsul Bahrain and Peter Periera with him); M/s. Skrine & Co.
For the 1st respondent - G. Sri Ram (Joseph Loo and Fiona Bodipalar with him); M/s. Shinmun & Associates
For the 2nd respondent - B. Thangaraj; M/s. Zainuriah & Thangaraj

JUDGMENT

Abdul Hamid Bin Hj. Omar LP:
In June 1983, the first respondent, Mae Perkayuan Sdn. Bhd. had desired to develop certain lands comprised in Lots 3243 to 3248, Mukim of Dungun, Trengganu, into a housing estate ("the Dungun Project"). It had also desired to purchase 6 Lots of agricultural land in Tampin, Mukim of Alor Gajah, Melaka, in total area 29.1 acres for the purpose of development into a housing estate ("the Alor Gajah Project"). To this end, the first respondent approached the appellant, Bank Bumiputra Malaysia Bhd., Kuala Trengganu ("the Bank"), for a bridging loan for the Dungun Project, and for money to purchase the land for the Alor Gajah Project.

On 25 June 1983, the Bank having studied details of the proposals of the first respondent, had agreed in writing to grant what it called 'overdraft facilities' to the first respondent, in the sum of RM4,500,000 (See the facility letter Exh. P2). Among the terms and conditions contained in Exh. P2 were these:

Facility:	secured overdraft for RM4,500,000.
Purpose:	(1) As building finance for proposed development of 6 Lots of land in Dungun ... RM2.4 million. (2) To purchase 29.1 acres of agricultural land in Alor Gajah ... RM2.1 million.
Duration:	For a period of 4 years.
Security:	Legal charge against the following: (1) (Six parcels of land in Dungun). (2) (Six parcels of land in Melaka).
Interest:	At 2.5% above Base Lending Rate. Any non-payment of interest as stipulated shall cause it to be **capitalised and added to** as principal sum, and interest shall be chargeable thereon at the same rate as prescribed above.
Commitment Fee:	Chargeable at 1% per annum over the **unutilised** drawing limit.
Repayments:	To be reduced progressively **by way of redemption sums** for the proposed housing development in Dungun. The redemption sum shall also cover the facility for land purchase

and is to be fixed later, upon request for release of titles to End-Financiers.

For your information, all facilities granted by us are subject to periodical review and repayable on demand although we do not at this time anticipate exercising our rights in this respect.

The offer was accepted by the first respondent and Exh. P2 constituted the contract of loan between the parties.

The position by end of July 1985 was that although there was evidence that the first respondent had completed the "earthworks and site preparation", there was no evidence to show that the amount disbursed by the Bank had not been spent by the first respondent for purposes of the development of the Dungun Project.

On 30 July 1985, the Bank's head office in Kuala Lumpur wrote to the manager of its branch in Kuala Trengganu a directive (Exh. P13) as follows:

It has already been decided that the customers service the monthly accruing interest since November 1984 and to take steps to regularise the position of their account failing which the facility to be recalled.

From your overdraft report dated 11 July 1985 we observe that substantial excess still prevailed in the accounts. **In this regards you are to implement the above decision immediately**. We expect to receive a copy each of your letter to the customers within two weeks of the date of this letter.

On 14 October 1985, the Bank's Manager at its branch in Kuala Trengganu wrote to the first respondent a letter (Exh. P5) which said thus:

Mae Perkayuan Sdn. Bhd.

OD/MC/G/83/121 - RM5,200,000

Pinjaman kemudahan diatas dirujukkan.

Untuk makluman tetuan, pihak Bank telah mengambil keputusan untuk menarik balik kemudahan diatas dan seterusnya tindakan undang-undang akan diambil terhadap tetuan.

Sekian, harap maklum.

(For your information the Bank has decided to **withdraw** the facilities given as mentioned above and consequently legal action shall be taken against you. That is all).

By letter dated 3 November 1985, the Bank's solicitors demanded repayment from the first respondent and its two guarantors, of the sum of RM4,322,813.04 being the principal sum plus interest outstanding as at 15 October 1985, failing which they would take legal action to recover the same, and if necessary, to auction the lands charged to the Bank. On 21 July 1986, the Bank caused to be issued a writ in the High Court at Kuala Trengganu against the first respondent for recovery of the amount owing on the overdraft facility, interest thereon at the agreed rate and costs, and against the second and the third respondents as guarantors of the loan. The first respondent entered an appearance, filed a defence and counter-claimed for breach of contract, special damages of RM45 million, and general damages. The second respondent also entered an appearance and filed a defence and so did the third respondent.

In the High Court at Kuala Trengganu the Judge (Mr. Justice Ahmad Fairuz) found as a fact that as at 29 March 1985 RM2.1 million had been disbursed for the purchase of the lands which comprised the Alor Gajah Project. The first disbursement for purpose of the Dungun Project was on 2 October 1983, and thereafter by 21 June 1984 a total sum of RM1,104,286.50 had been disbursed by the Bank on the productions of architect's certificates showing that the works specified therein had been completed.

At the conclusion of the trial the learned Judge found that the Bank had committed a breach of the bridging loan agreement (Exh. P2) and dismissed the plaintiff's claim against the respondents. He allowed the counterclaim of the first respondent and awarded damages, against the Bank, of RM6 million for the Dungun project and RM6 million for the Alor Gajah project; RM5 million aggravated damages for injury allegedly suffered by the Sultan of Trengganu; and ordered payments totalling RM1,774,835.50 to be made by the Bank to third parties. Although the awards made by the Judge on the first respondent's

counter-claim amounted to RM18,774,834.50, yet he gave no reason whatever as to how he assessed these damages. The Bank now appeals against the learned Judge's conclusion that it had committed a breach of the agreement and also against the quantum of damages awarded on the counter-claim against it.

It is not disputed, and the evidence shows, that the facilities were withdrawn by the Bank because the interest instalments due on the amounts disbursed by the Bank had not been paid by the first respondent. It was also not disputed that the Bank **never** caused to be served upon the respondents any letter demanding that they service or pay up the outstanding interest. However, the Bank did issue a letter, **after** the facilities were withdrawn, and that letter was dated 23 December 1985 (Exh. P6B) addressed to the first respondent stating as follows:

Faedah Denda Atas Bayaran Lewat.

Adalah dimaklumkan bahawa mulai 1 Disember 1985, faedah denda akan dikenakan ke atas bayaran ansuran/ feadah yang lewat dibayar. Kadar faedah denda yang akan dikenakan ialah sekurang-kurangnya 1% setahun ke atas kadar faedah yang sedia dikenakan dan jumlah denda dikira berdasarkan kepada jumlah hari ansuran/faedah itu lewat dijelaskan. Faedah denda minima yang dikenakan ialah sebanyak RM1.

Untuk mengelakkan faedah denda itu dikenakan ke atas akaun anda, adalah dinasihatkan supaya anda menjelaskan bayaran ansuran/feadah tersebut pada atau sebelum tamat tempoh.

Terima kasih.

(Penalty Interest On Late Payments

This is to inform you that effective 1 December 1985, penalty interest shall be imposed on instalments/interest which are paid late. The rate of penalty interest which will be imposed will be at least 1% per annum on top of the interest which is payable and the total penalty shall be calculated based on the total number of days on which payments which ought to be made, are not made. The minimum penalty interest is RM1.

To avoid this penalty interest being imposed on your account, you are advised to settle the instalments/interest before the end of the period).

In respect of this letter (Exh. P6B) both the first and second witnesses for the Bank could not but admit that there was nothing in Exh. P2 (the agreement) which required the first respondent to make repayment by fixed instalments, or which allowed the Bank to impose a penalty of 1% p.a. on interests or instalments remaining unpaid.

For the Bank, Counsel submitted that the overdraft facilities were withdrawn because the Bank had the right to do since a clause in Exh. P2 stated that all facilities granted by the Bank "are subject to periodical review and repayable on demand".

We can see no evidence on record to show whether any review was in fact carried out by the Bank and whether any and if so what demand had been made or notice served by the Bank on the respondents before the Bank decided to withdraw the overdraft facilities.

As regards the non-payment of interest on the amounts disbursed by the Bank, it is a term in Exh. P2 that any interest not paid would be capitalised and added to the principal sum, and further interest would be chargeable thereon at the rate of 2.5% above the Bank's base lending rate. Exh. P2 also made it clear that repayments of the money advanced by the Bank would be done progressively "by way of redemption sums see for the proposed housing development in Dungun. The redemption sum should also cover the facility for land purchase (in Melaka) and is to be **fixed later** on request for release of titles to End-Financiers".

The Bank did not call its Chief General Manager at its head office Kuala Lumpur to give evidence. But the respondents called him as a defence witness. He is Arsam bin Damis who had worked in Bank Bumiputra Malaysia Bhd. from April 1977 to 1 August 1987, left the Bank and rejoined it on 1 June 1990 and is still with the Bank's head office as Chief General Manager.

According to Encik Arsam, an overdraft had two things in common, that is:

(i) the drawdown of the loan is by way of issue of charge; and

(ii) there is no **fixed period**.

He said that what the Bank had granted to the first respondent in Exh. P2 was not an overdraft facility, but a bridging finance operated under overdraft. Bridging finance is a facility to finance the construction of the houses by the first respondent. The finance is to bridge the period between the time when the developer starts to prepare the ground works and the period when the developer will start to receive the proceeds of sales of the houses from purchasers which is, when sale and purchase agreements are signed.

Thus, the first respondent would receive 10% of the sale price of a house when it enters into a sale and purchase agreement with a purchaser. Upon receipt of this 10%, the first respondent would pay over the same to the Bank to reduce its indebtedness to the Bank. Similarly, when a purchaser pays to the first respondent a second instalment under the sale and purchase agreement upon certification by the architect that a certain stage of the house was completed, the first respondent would pay this over to the Bank; and this procedure would continue until the house was completed, and by which time the purchaser would have paid the total sale price of the house and, if all houses are sold, the Bank would by then be repaid all their money plus interest.

It follows that until the first respondent commenced receiving proceeds of sale from the house purchasers, it was under no obligation to pay to the Bank anything towards the principal sum or towards the interest. But the Bank had to fulfill its obligation to the first respondent in providing the bridging finance, otherwise the project would fail, in which case the first respondent would suffer losses and the Bank would not be able to recover its money plus interest.

The bridging finance is that amount which the Bank, after careful study, finds to be what the first respondent actually needs to carry out the works on the land, before the first respondent starts to get income from the project.

Encik Arsam also explained that the redemption sum mentioned in Exh. P2 is the sum to redeem the land titles charged to the Bank and held by the Bank as security for the bridging finance. The amount of repayment to be paid by the first respondent would depend on the outstanding principal sum plus interest.

The second respondent Mohamed @ Mohamed Anuar bin Embong is a director of the first respondent. He said that the first respondent had completed preparation of the site for development by levelling all the hills and rocks. He had obtained the subdivision of the lands into 93 lots. The layout plan had been approved by the Land Office on 19 March 1983. (Exh. D15 & D16). The building plans for shop-houses and dwelling houses were approved on 4 June 1983 by the Town Council of Dungun, (Exh. D17). Getting the approvals took a great deal of time because these were matters beyond his control. In any event, before the overdraft facilities were terminated he had already obtained all the necessary Government approvals including a housing developer's licence. The only licence which had then yet to be approved by the Government was an advertising and sale permit without which the first respondent would not be able to advertise in the newspapers about the sales of the dwelling houses and the shop houses to be built. He could begin construction of the houses only after getting all these necessary approvals from the Government agencies as required by law. Up to the time of the termination of the overdraft facilities, a considerable sum of money had been spent by the first respondent but it had received no income because no sale and purchase agreement could yet be signed.

Having examined the evidence and the documents produced by the parties, we find that the first respondent had submitted its project and feasibility studies to the Bank. According to Encik Arsam, the Bank would not have agreed to finance the housing project unless it was fully satisfied that the project was viable. It goes without saying that when a bank offers a loan, it does so with a view to profit.

Upon the evidence, we find that there had been negotiations between the Bank and the first respondent before the Bank agreed to give the bridging finance in the terms appearing in Exh. P2. The Bank knew full well that the first respondent would receive no income whatsoever from the project until sale and purchase agreements were signed. The Bank would not

be expecting any repayment until then. For that reason, the Bank had agreed to capitalise all interest on all sums disbursed by the Bank, which means interest which was not paid would be compounded.

From the contemporary documents we find that the reason why the Bank recalled the loan was solely because the first respondent had not paid the interest. The Bank had never notified the first respondent that if interest were not paid, it would recall the loan. Nowhere in Exh. P2 is it said that the first respondent was required to pay the interest monthly or at any other intervals.

The overdraft facility for bridging finance was for a specific period of four years. When the Bank, without notice, recalled the loan on 14 October 1985, there was still about eight and a half months to run.

We note that to ensure that the first respondent would fully utilise the loan, the Bank had imposed a commitment fee of 1% per annum over the unutilised drawing limit. But now the Bank says that despite the fixed period of 4 years, a clause in Exh. P2 allows it to recall the loan at any time. This Court had in *Eushun Properties Sdn. Bhd. v. MBF Finance Bhd.* [1992] 2 MLJ 137 dealt with a similar issue, and there Mohamed Yusoff SCJ quoted what Goff J. said in an unreported case of *Titford Property Co. Ltd. v. Cannon Street Acceptance Ltd*. on 22 May 1975 -

> It seems to me, where a bank allows an overdraft for a **fixed time** for a specific purpose - whether the time be such as the parties think is required for the achievement of the purpose, or only the most the bank will also allow, that time is binding on the bank; otherwise the customer might well be led into a disastrous position, as has happened here. The customer, on the faith of the bank's promise to a loan, an overdraft for a fixed term, commits himself and then finds the overdraft cut off, so that he cannot meet his liabilities, and in addition he had incurred indebtedness to the bank in respect of abortive expenditure .. (The bank) could not, in my judgment, with one hand grant a facility for a term for a purpose which to its knowledge clearly involves the plaintiffs in incurring expenditure and liabilities, with a view to ultimate profit, and with the other take it away by an unqualified right to require repayment on demand at any time. In my judgment, therefore, I must modify cl 9, by reading it as **subject to the provision as to the duration of this facility**, or ignore it altogether.

We consider that the Bank was not entitled to issue the recall letter purely on the ground that interest had not been serviced by the first respondent because the first respondent is not obliged under the agreement to pay interest during the bridging period.

It would have been otherwise if, for example, the Bank had established that the amount disbursed had been used for purposes other than the development of the project, or the project had been abandoned, which was not the case here. To that extent, the demand clause could be invoked by the Bank.

The Bank's first witness stated that the other reason for recalling the loan was because the first respondent had not started to construct the houses. If that had been the case, then we consider that there was a reciprocal obligation on both parties to discuss the reasons for the delay or to make proposals and counter-proposals and try to solve the problem, and if necessary to extend the period of completion of the project so that neither party would suffer any loss.

Under the circumstances, we find that the Bank had in recalling the loan mid-term, committed a breach of the agreement contained in Exh. P2, and we accordingly affirm the learned trial Judge's decision on this issue.

The Quantum of Damages, generally.

The consequences of a breach of contract are governed by s. 74 of the Contract Act 1950, which states -

> 74.(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

The first respondent's counterclaim

In their counterclaim, the first defendant sought special damages amounting to RM49,274,823.43 for loss of profits from the Dungun and Alor Gajah housing projects, and also general damages. The learned Counsel for the Bank submitted that this counterclaim must fail as the respondent had failed to give the details and itemise the losses in the statement of defence. He urged that there was no evidence adduced in Court to support this counterclaim on special damages.

The first respondent's claim for loss of profits in respect of the Dungun Project

We note that before the Bank approved the bridging finance in the form of an overdraft for a fixed period, the first respondent had submitted its project papers and feasibility study (Exh. D20) prepared by Mohd. Anuar & Co. who were financial and land consultants, housing developers and first class appraisers. These papers gave the details of the works to be carried out for purposes of the project, including construction costs, management costs, consultant's fees, legal fees, contractors profits, and interest to be paid to the Bank, etc., and the sale price of each type of house to be sold. The lands on which the houses were to be built were not Malay Reservation lands. The 15 units of shophouses were of double storey type while the dwelling houses were to consist of 16 units of bungalows, 20 units of semi-detached houses and 42 units terrace houses all of single storey type. Besides Malays, there was a non-Malay population of about 60,000 in the neighbourhood of the housing projects, so that it could be reasonably presumed that there would have been a significant market for the dwelling houses. The evidence of the second respondent as director of the first respondent shows that he had received a large number of inquiries from potential buyers but could not enter into any sale and purchase agreements with them because the first respondent had not obtained the necessary advertisement and sale permit from the Housing Ministry. The witness had discussed the details of the project papers and feasibility study with the Bank according to which the anticipated total development costs of the project would have been RM6,030,920 while the anticipated proceeds of sales of the dwelling houses were said to amount to RM12,250,000 in which case, it was anticipated that the first respondent would make a projected profit of RM6,219,080.

The evidence of the Chief General Manager of the Bank's head office shows that the Bank would not have approved the bridging finance unless it was satisfied that the projects would be viable and profitable. The Bank was fully aware and knew that if for any reason the projects could not be completed, the first respondent could incur a heavy loss in terms of loss of profit, and consequently, the Bank too might incur losses as the first respondent might not be in a position to repay the sums advanced to it.

The notes of evidence show that although the Bank had closed its case as plaintiff, in the interest of justice, the trial Court had allowed the Bank to re-open its case by calling the Bank's Manager at Kuala Trengganu, Encik Mohd. Bustamin, to give his comments on Exh. D20. This witness said that the project papers and feasibility study showed that the project was a profitable one, and the Bank had acknowledged that it was a profitable and viable project before agreeing to give the bridging finance.

The fourth witness for the respondents was a quantity surveyor, Mohd. Rasid bin Hainin, with Akitek Indahreka of 13 years standing. Prior to joining Akitek Indahreka he had been in Government service for 5 $^{1}/_{2}$ years. While in Government service, his duties included preparing bills of quantities, tender agreements and he was also in charge of school, road and water works projects, until he joined Akitek Indahreka in 1983. He was involved in about 20 housing projects in Trengganu. He said more than 90% of housing projects in Trengganu had been completed.

Mohd. Anuar & Co. had engaged Mohd. Rasid to prepare the layout and building plans for the first respondents' housing projects. Mohd.. Rasid had prepared the most economical costs for the project by which he meant that having regard to the progress and the development of the surrounding areas, the houses to be constructed must be of the types which would be the most saleable. His calculations showed that the total development cost would amount to RM5,821,878, the houses when completed and sold would fetch RM11,216,600 and consequently the project would bring a profit of around RM5.3 million.

The law in England with regard to measure of damages for breach of contract to lend money is stated in the treaties on damages in **Halsbury's Laws of England** 4th Edn. Vol. 12 p. 465, paragraph 1179 -

> Damages for breach of a contract to lend money may be nominal or substantial according to the circumstances which will in each case determine the reasonable contemplation as to the loss which is liable to result from the breach. Thus the cost of raising the money elsewhere may be recoverable as a natural result **and where the defendant had knowledge of other probable consequences of his breach**, he may have to render full compensation for the loss thereby inflicted upon the plaintiff. Whether the damages claimed are damages arising naturally from the breach or damages for which the contract breaker is liable because of his special knowledge at the time of the contract depends also on all the circumstances of the case.

It will be seen that the law in this country as to the measure of damages for breach of contract as provided under s. 74 of the Contracts Act, is the same as in England, and requires that the damage or loss suffered must be within the contemplation of both parties. In this case, the Bank had full knowledge from the very beginning that the project, if successfully and duly completed, would bring in a profit of about RM5.3 million to the first respondent. The Bank had studied every aspect of the project and had decided what amount was required by the first respondent as bridging finance before the first respondent could be expected to derive a profit from sales of dwelling houses. Once the first respondent commenced to derive such profit, it could be expected to apply the same towards reduction of its overdraft with the Bank and completion of the project. It is public and common knowledge that where a financial institution withdraws its financial facility from a developer engaged on a housing project, it becomes virtually impossible for the developer to obtain financial facilities from alternative sources.

We are, therefore, of the view that the loss of profits on the housing project which the first respondent would suffer was the natural and probable result of the breach of agreement by the Bank, and when the Bank agreed to provide the bridging finance to the first respondent, the Bank well knew of the loss that the first respondent would incur should the Bank break the contract.

In *General Securities Ltd. v. Don Ingram Ltd.* [1940] SCR (Canada) at 670, the facts were that under an agreement in 1933 the respondent was the retail distributor, and for some time in 1937, the wholesale distributor, for the Studebaker Corporation of Canada, which manufactured and sold automobiles. In February, 1934, the appellant and the respondent entered into an agreement by which the appellant undertook to furnish such credit and advance such moneys as might be required from time to time to finance exclusively the respondent's purchases of automobiles and to supply working capital for the respondent's business. Pursuant to this agreement the appellant, during the years 1934, 1935, 1936 and 1937 furnished the respondent with credit and made advances. In the autumn of 1937 the respondent was contemplating the purchase of twenty-six automobiles from the Studebaker Corporation and the appellant agreed unconditionally with the respondent to finance the purchase of these automobiles, and in October of that year the respondent, relying upon this agreement with the appellant, contracted with the Studebaker Corporation to purchase these automobiles. In December the automobiles reached Vancouver and the bills of lading, with draft attached, were presented to the respondent for acceptance and payment. The appellant, on being requested to furnish funds for this purpose pursuant to the agreement, refused to do so. The respondents having endeavoured unsuccessfully to arrange elsewhere for funds to meet the draft, the Studebaker Corporation terminated its agreement with the respondent on the 10 January 1938, and sold most of the automobiles to persons appointed by the Corporation in place of the respondent. The learned trial Judge found that as a result, the respondent was obliged to discontinue its business and its assets had to be sold at a loss. The Judge was of the opinion that loss of profits on the automobiles and loss of the respondent's franchise with the consequent loss of its business and loss on realization of its assets were under the circumstances natural and probable results which must have been and were within the contemplation of the appellant. The appellant was therefore liable to pay damages to the

respondent accordingly. The Court of Appeal, and the Supreme Court of Canada confirmed that judgment.

The loss of profit to the first respondent here, will have to be assessed by the Court on the evidence available before it. Neither in the Court below nor before us had the Bank made any attempt to challenge or contradict the computations by the first respondent contained in its project paper and feasibility study or the testimony given by the quantity surveyor on behalf of the first respondent.

As for the quantum of damages for the loss of profits in respect of the Dungun project the learned Judge summed up as follows:

(i) Keterangan SD5 menunjukkan kedua-dua pihak Bank dan defendan 1 telah sama-sama bersetuju bahawa keuntungan yang akan diperolehi daripada projek di Dungun ini ialah tidak kurang daripada RM6 juta dan pihak Bank akan memperolehi balik wang pokok yang dipinjamkan kepada defendan 1 bersama-sama itu. Tidak pula terdapat keterangan-keterangan yang menyatakan selain daripada apa yang dikatakan oleh SD5. Ditunjuk lagi oleh SD5 bahagian kandungan D20 yang menyatakan bahawa keuntungan bersih dari projek di Dungun ialah sebanyak RM6, 219,800. Dan tidak berdapat keterangan-keterangan yang menumpaskan implikasi keterangan-keterangan SD1 dan SD2 bahawa D20 telah diambilkira oleh pihak Bank sebelum P2 dikeluarkan.

((i) The evidence of DW5 shows that both the Bank and the defendant No. 1 had agreed that the profits to be derived from the project at Dungun would not be less than RM6 million and that the Bank would be able to recover from the profits the amount advanced to the defendant No. 1 together with interests. There is no other evidence except what had been stated by DW5. DW5 also pointed out the relevant part of exhibit D20 which stated that the nett profit from the Dungun project would be RM6, 219,800. No evidence was adduced to challenge the evidence of DW1 and DW2 who stated that the Bank had taken into consideration the contents of exhibit D20 before exhibit P2 was issued).

Be that as it may, on the evidence produced in the Court below, there appears to be two computations as to profits that the Dungun project would have fetched. Apart from the evidence of expected profits relied upon by the learned Judge, there was the evidence of Mohd. Rasid, the quantity surveyor with Akitek Indahreka, who testified to the effect that after taking into account various factors including development costs, "this project, if completed, would realise a profit. Based on experience, the total net profit would be about RM5,394,722" (RM11,216,600 - RM5,821,878). In consideration, we are of the view, that the net profit as estimated by Mohd. Rasid would, on balance of probabilities, be acceptable and should, therefore, be preferred to the assessment of RM6.2 million made by the learned Judge and we so find. We would also award interest thereon at the rate of 5% p.a. from date of accrual or cause of action until judgment under s. 11 of the Civil Law Act, 1956, and thereafter, until payment, at the rate of 8% p.a. under O. 42 r. 12 of the Rules of the High Court.

The first respondent's claim for loss of profits in respect of the Alor Gajah Project

As for the claim for other damages suffered, we do bear in mind s. 74 of the Contracts Act which is declaratory of the common law rules as to assessment of damages in contract enunciated in *Hadley v. Baxendale* [1854] 9 Ex, 34. Once the claimant has proved that the kind of damages suffered was foreseeable then the guilty party is liable to the full extent of it whether foreseeable or not provided that the extent of the damages claimed has been established on the balance of probabilities. In other words, it would not be sufficient for a claimant to merely show that the extent of damage alleged was merely possible. To hold otherwise would dispense with proof of quantum altogether. (See **Litigation Support and Financial Assessment of Damages** by D.R. Chilver and CJ Lemar p. 57).

In the light of the principles governing the assessment of damages, we are unable to subscribe to the judgement made by the learned Judge when he allowed the loss of profits in respect of the Alor Gajah project. It is our view that loss of profits claimed in respect of the Alor Gajah project were dependent upon the application of profits expected from the Dungun

project and would be too remote and should not therefore be allowed. We therefore disallow this claim and set aside the Judge's award of RM6 million in respect thereof.

The first respondent's claim for exemplary damages

The principles for an award of exemplary damages appear in *Rook v. Barnand* [1964] AC 1129 and *Cassell v. Broome* [1972] 1 All ER 801. In this case, we feel that the first respondent had not established its claim in accordance with these principles. We therefore disallow this claim and set aside the Judge's award of RM5 million in respect thereof.

The first respondent's claim for re-imbursement of damages paid to third party

Our view is that the first respondent had not properly substantiated this claim. There was no evidence adduced from the third parties concerned showing that they had received damages from the first respondent. We therefore disallow this claim and set aside the Judge's award of RM1,774,834.50 in respect thereof.

The Bank's claim for recovery of the loan

The dismissal of the Bank's counterclaim in respect of the sum owing by the first respondent to the bank on the overdraft facility on the ground that the Bank was in breach of contract in recalling the overdraft prematurely cannot be justified. The Bank's claim for recovery of the loan was entirely a separate matter from the first respondent's claim for damages against the Bank. There is no ground in law for exempting the first respondent from liability to repay the loan. However, the Bank's claim for interest on the loan at the rate agreed in the facility letter, for the period after the overdraft was prematurely recalled, must be disallowed on the ground that in so recalling the overdraft, the Bank was in breach of contract. The first respondent must, therefore, pay the agreed rate of interest on the loan up to the date when the overdraft was prematurely withdrawn. It follows that the amount the Bank is entitled to recover as at 15 October 1985 is RM4,322,813 (RM Four Million Three Hundred and Twenty Two Thousand Eight Hundred and Thirteen). In addition, the Bank should be entitled to simple interest of 5% p.a. as from the time the overdraft was prematurely withdrawn, until judgment, under s. 11 of the Civil Law Act 1956, and thereafter, until payment, at the rate of 8% p.a. under O. 42 r. 12 of the Rules of the High Court. And, we so order.

As for costs, it is our view that each party should bear its own costs here and in the Court below and we so order. Deposit to be refunded to appellant.

Eusoff Chin SCJ, who has read this judgment, has expressed his agreement with it.

Edgar Joseph Jr. SCJ:

Supporting Judgment

I have had the advantage of reading the draft judgment of the Lord President with which I agree and to which I would add this short supporting judgment on the issue of liability, insofar as the first respondent's counterclaim is concerned.

The appellants, Bank Bumiputra Malaysia Berhad (the Bank), had given the overdraft facility to the first respondent, Mae Perkayuan Sdn. Bhd. (the Customer) pursuant to its letter of facility dated 25 June 1983, addressed to the Customer, being Ex P2 (the facility letter), wherein were set out the terms of the loan, the material portions thereof, in **typescript words,** being as follows:

Facility:	Secured Overdraft for RM4,500,000	
Purpose:	(1) **As building finance for proposed development** of 6 lots of land in Dungun belonging to Yang Teramat Mulia Yang Di Pertuan Muda, Terengganu (Now DYMM Sultan of Terengganu).	$2.4 Million
	(2) **To purchase** 29.1 acres of agricultural land in Alor Gajah, Melaka (including incidental cost of RM100,000).	$2.1 Million
		$4.5 Million
Security:	Legal Charge against the following:	
	For (1) above	
	(i) First Legal Charge (Third Party) against 6 parcels of land in Mukim & District of Dungun, Terengganu under MG 245 Lot 3243 to MC 250 Lot 3248.	

For (2) above

(ii) First Legal Charge against 6 parcels of land to be purchased in Mukim Pulau Sebang, Alor Gajah, Melaka under:

G 3487 Lot 2099. Mukim Grant Lot 1125.
G 3488 Lot 2100. Mukim Grant Lot 1126.
G 3489 Lot 2101. Mukim Lease Lot 1759.

Duration: For a period of 4 years.

Interest: At 2.5% above our Base Lending Rate.

The Bank may, at its absolute discretion vary the rate of interest from time to time and the variation shall take effect from the date specified in the notice.

Any non-payment of interest as stipulated shall cause it to be capitalised and added to the principal sum and interest shall be chargeable thereon at the same rate as prescribed above.

Commitment Fee: Chargeable at 1% per annum over the unutilised drawing limit.

Disbursement: (1) Bridging Finance for RM2,400,000

To be released progressively against Architect's Certificate of Completion, after compliance of all conditions precedent and security document on the properties in Dungun have been executed and consent to charge has been obtained.

(2) Purchase of land in Alor Gajah for RM2,100,000

Funds to be released through the Bank's solicitors direct to the vendor subject to confirmation by solicitor that:

(i) Balance of purchase price has been paid (if any).
(ii) Unencumbered titles and valid memorandum of transfer are in their custody.

Repayment: To be reduced progressively by way of redemption sums for the proposed housing development in Dungun. The redemption sum shall also cover the facility for land purchase and is to be fixed later, upon request for release of titles to End- Financiers.

However, the ante - penultimate para of the facility letter **in printed words** was as follows:

> For your information, all facilities granted by us are subject to periodical review and repayable on demand although we do not at this time anticipate exercising our rights in this respect.

In the event, in compliance with the penultimate para of the facility letter, which read as follows:

> If the above terms and conditions are acceptable to you, kindly signify your acceptance by signing and returning the duplicate of this letter within fourteen (14) days of the above date,

the customer signified acceptance of those terms, and returned the same. Consequent thereto, the customer executed the security documents, being the charges under the National Land Code, 1965, which provided that the loan shall be repayable on demand.

It will be seen, therefore, that on the one hand, the typescript words of the facility letter which constituted the contract of loan provided for a loan for a specified period **(a term loan)** and for a specified purpose, to wit, to provide bridging finance of $2.4 million for the Dungun Project and to provide finance of $2.1 million for the purchase of lands in Alor Gajah, **whereas** on the other hand, the printed words in the facility letter and the security documents, provided that the loan, shall be repayable **on demand.**

Clearly, the typescript words, in their ordinary meaning, contradict the printed words in the facility letter, as well as the words in the security documents. In a situation such as this, due weight must be given to the "*contra proferentes* rule" and the printed words must be rejected in favour of the typescript words.

I am supported in this by the following passage in **Chitty on Contracts,** Vol. 1, 24th Edn., para 716, p. 330 which reads:

> **Printed and written clauses.** Where the contract is contained in a printed form with writing superadded, the written words, if there should be any reasonable doubt about the sense and meaning of the whole, are to have greater effect attributed to them than the printed words, in as much as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions

and subjects. *Robertson v. French* [1803] 4 East 130, 136; *Heilbut, Symons & Co.* [1917] 2 KB 348, 358, 361; *The Brabant* [1967] 1 QB 588. And in event of a difference between words and figures, the written words normally prevail. *Saunderson v. Piper* [1839] 5 Bing NC 425.

Even discounting the fact that "the term loan" provisions were in typescript words while the "on demand" provisions were printed, the same result as aforesaid should follow if the provisions were entirely in typescript words. In this, I am supported by the following passage in **Paget's Law of Banking** (10th Edn.,) p. 183:

> Some banks when lending for a specific period (a term loan) pursuant to a facility letter setting out the terms of the contract of loan provide either in the facility letter or in their security documents that the loan shall be repayable on demand. It is submitted that in the event of such conflicting provisions, if there is no breach by the borrower of the conditions on which the loan was granted, the provision for a term loan would take precedence. The right to repayment on demand is repugnant to the main object of the transaction (See *Titford Property Co Ltd v. Cannon Street Acceptances* [1975] unreported; and see also the cases on fundamental breach culminating in *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827). In short, where a banker agrees to lend for a specific period, that agreement cannot, unless there is a breach by the borrower, be terminated by the bank purely on the strength of its alleged right to repayment on demand or on the strength of such a right given in its standard security document.

In *Titford Property Co Ltd v. Cannon Street Acceptances (ibid),* Goff J. (as he then was) said this:

> It seems to me, where a bank allows an overdraft for a **fixed time** for a specific purpose - whether the time be such as the parties think is required for the achievement of the purpose, or only the most the bank will allow, that time is binding on the bank; otherwise the customer might well be led into a disastrous position, as has happened here. The customer, on the faith of the bank's promise to a loan, an overdraft for a fixed term, commits himself and then finds the overdraft cut off, so that he cannot meet his liabilities, and in addition he had incurred indebtedness to the bank in respect of abortive expenditure ... [The bank] could not, in my judgment, with one hand grant a facility for a term for a purpose which to its knowledge clearly involves the plaintiffs in icurring expenditure and liabilities, with a view to ultimate profit, and with the other take it away by an unqualified right to require repayment on demand at any time. In my judgment, therefore, I must modify cl 9, by reading it as **subject to the provision as to the duration of this facility,** or ignore it altogether.

The above passage in the judgment of Goff J. was applied by our Supreme Court in *Eushun Properties Sdn. Bhd. v. MBF Finance Bhd.* [1992] 2 MLJ 137.

The Bank might have had no intention to grant a term loan to the customer in this case, but that is beside the point because in construing an agreement in writing, the intention of the parties must be gathered from the words appearing in the contract and parole evidence tending to vary the written agreement would be inadmissible though such evidence would be admissible to show that the minds of the contracting parties were not *ad idem*. There was, however, no attempt by the Bank in this case to claim rectification on the ground that the agreement did not represent the common intention of the parties, that being the only ground upon which rectification can be granted.

The Bank was therefore in breach of contract when it treated the term loan as an on demand loan and recalled it prematurely, that is to say, before its right to do so had accrued and so the customer is entitled to damages.

If, contrary to my primary view, the typescript words and the printed words can be read together and be given a reasonable meaning, from the commercial point of view, and the contract of loan is construed as an on demand loan, the borrower in this case was entitled to some reasonable time to re-pay. This is emphasised by the ante-penultimate para of the facility letter, which reads:

> For your information, all facilities granted by us are **subject to periodical review** and repayable on demand although we do not at this time anticipate exercising our rights in this respect.

(Emphasis added).

In this context, I am reminded of what Linden J. said in the Canadian case of *Broadloom Cpn (1968) Ltd v. Bank of Montreal et al* [1979] 25 OR (2d), 198, which was an action for damages for failure of a creditor to give reasonable time for repayment of an on demand loan. Linden J. recognised that the bank concerned was obliged to give the debtor some reasonable time to repay the loan even though the loan was a demand loan. He went on to hold that in assessing what length of time was reasonable in a particular fact situation various factors must be analyzed, namely:

(1) the amount of the loan;
(2) the risk to the creditor of losing his money or the security;
(3) the length of the relationship between the creditor and the debtor;
(4) the character and reputation of the debtor;
(5) the potential ability of the debtor to raise the money required in a short period;
(6) the circumstances surrounding the demand for payment; and
(7) any other relevant factors.

In the recent case *Emar Sdn. Bhd. v. Aidigi Sdn. Bhd.* [1992] 2 MLJ 734 I had occasion, when speaking for the Supreme Court, to quote with approval the above passage in the judgment of Linden J.

The next question to consider is whether, upon the evidence in the present case, the Bank had carried out the periodical survey they had promised and then given the customer a reasonable time, before recalling the overdraft facility.

I am of the view that there is no evidence or no sufficient evidence that the Bank had carried out a final periodical survey and then given the customer a reasonable time for repayment before recalling the overdraft facility, and so, on this alternative ground also, the Bank was in breach of contract and consequently, the customer is entitled to damages.

The Lord President and Eusoff Chin, SCJ, who, together with me, comprised the Court, have read the draft of this supporting judgment and have asked me to say that they agree with it.